

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6027
77-6031

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CAPITAL REGION CITIZENS COMMITTEE, ET AL.,
Appellants

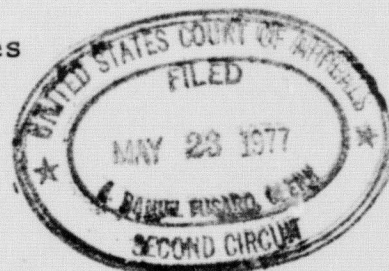
v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION
OF THE UNITED STATES, et al.,

Appellees

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL APPELLEES



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JURISDICTION

Judgment was entered on September 29, 1976 (A. 525-526),
and amended to include a statement under Rule 54(b) F.R.Civ.P.
on March 18, 1977 (A. 547). ^{1/} Notices of appeal were filed
November 26 and November 29, 1976 (A. 4, A. 548-551). This
Court's jurisdiction rests on 28 U.S.C. sec. 1291 and 28 U.S.C.
sec. 1292(a).

^{1/} Numbers beginning with A are pages in the appendix.

QUESTIONS PRESENTED

1. Whether there were disputed questions of material fact to render disposition of this case by summary judgment improper.

2. Whether under all of the circumstances of this case the Environmental Impact Statements were adequate and whether the Section 4(f) procedures and findings were adequate.

STATEMENT

This is an appeal from the entry of summary judgment finally accepting environmental impact and related statements for the construction of Interstate Route 88 (I-88) (A. 525-547), a highway between Binghamton and Albany areas of New York.

I-88 was first federally approved in December of 1968 (A. 288), just over one year before passage of the National Environmental Policy Act (NEPA). Much of the planning and initial administrative work was done in the earliest days after passage of NEPA (A. 288-294). As a result, there is no single document representing the Environmental Impact Statement for I-88. Each section of I-88, for which an EIS was required, has its own EIS. However, there is also a supplemental EIS covering the entire road, and linking the individual EIS's. The supplemental EIS, called the "Comprehensive State of Environmental Considerations for Interstate Route 88 Between

the Binghamton Metropolitan Area and the Capital District Area" (Comprehensive Statement), is inserted into the final EIS for I-88, Sanitaria Springs to Broome - Chenango County Line portion. This EIS has dark green covers. There is also, of relevance to this appeal, a final EIS covering the Albany-Schenectady area wherein the appellants live (A. 6-8, A. 16-17). That final EIS is entitled, Final Supplemental Environmental Impact Statement and Final Determination Pursuant to: 49 U.S.C. sec. 1653(f), 42 U.S.C. sec. 4332(a)(c), 16 U.S.C. sec. 470(f), Interstate Route 88 Schoharie-Schenectady County Line to N.Y.S. Thruway (I-90) Schenectady County (Albany EIS). The Albany EIS and ("4(f)" statement covering parks under 29 U.S.C. sec. 1653(f)), and an accompanying technical studies volume have light blue covers. ^{2/} Finally, there is the EIS for the Otsego and Schoharie Counties area (in white cover) which included a relevant 4(f) statement. The specific contents of the several EIS's and 4(f) determinations will be discussed in somewhat more detail as they become relevant in the Argument sections of this brief.

^{2/} The Albany EIS also contains an introduction which, on a few points, discusses I-88 in its totality.

I-88 itself is intended by New York State, despite its interstate designation, to be primarily a local road (Albany EIS, pp. 5, 16-18; Comprehensive Statement pp. 50-57, 76). The first objective is to allow the rural poor in the I-88 corridor to get jobs by attracting economic development and encouraging minor population redistribution (Comprehensive Statement pp. 50-60). Most of the I-88 corridor is sloping, narrow, and strongly affected by its geography (Comprehensive Statement pp. 10, 50-52, 57-60; Albany EIS p. 7). This restricts choices and prospects, and together with other factors prohibits successful farming. It is not expected that the road will bring in new population. The only areas expected to grow in population are the fringes of the Binghamton and Albany areas (Albany EIS p. 8). Such growth is not even among the secondary objectives set out for building I-88.

I-88 in this case is being attacked almost exclusively by a coalition of groups and individuals from the Albany region (A. 6-8). (The plaintiff-appellants will be referred to collectively as Capital Citizens.) Capital Citizens make many allegations of error. First among them appears to be whether the EIS was properly prepared and supervised, since it was done

by the State, which hired a contractor to prepare the draft document. Also alleged is inadequate EIS discussion of air pollution and alternatives to building I-88 in any form. Above all, Capital Citizens object to disposition by summary judgment.

In 1973, the district court issued a preliminary injunction against certain phases of construction of I-88 because of a lack of compliance at that time with the applicable law (A. 529). Thereafter on three occasions certain phases were relieved from the injunction. Finally, after a hearing on motions to lift the injunction as to the Otsego- Schoharie segment and the northeast terminus, relief was granted (A. 530-550). The court found the various EIS to be adequate, the 4(f) determination valid in all respects, and the federal participation in the preparation of the EIS sufficient under Public Law 94-83, as interpreted by this Court in Conservation Society of Southern Vermont v. Secretary of Tran., 531 F.2d 637 (1976). This appeal followed.

ARGUMENT

I

THERE ARE NO GENUINE MATERIAL
ISSUES OF DISPUTED FACT

Capital Citizens object to disposition of this case by summary judgment particularly with respect to their allegation that delegation to the State of preparation of the EIS was not sufficiently coordinated or "overseen" by the FHWA. (Br. 16-32) In order to avoid summary judgment, a plaintiff must offer, on the record, evidence of specific facts supporting his allegations. General statements or conclusions, even under oath, are not enough. Friends of the Earth v. Coleman, 513 F.2d 295, 298 (C.A. 9, 1975); Citizens Environmental Council v. Volpe, 484 F. 2d 870, 873 (C.A. 10, 1973), cert. den., 416 U.S. 936. All or nearly all of Capital Citizens' issues on appeal are general complaints which go only to the sufficiency of record documents without offering any evidence of specific deficiencies or genuine disputes as to the facts.

Capital Citizens challenge the amount of federal participation in preparation of the EIS. They admit, and the district court noted, that there were meetings with federal officials, and that the EIS went back and forth many times between state and federal officials (A537-A538, A540-A541). Capital Citizens offer no specific evidence that the officials were acting in bad faith and not really doing the job they appeared to be doing.^{3/} Mere general charges that officials are not doing their job can not avoid summary judgment. Burglin v. Morton, 527 F.2d 486, 489 (C.A. 9, 1976), cert. den., 425 U.S. 973. To put it another way, there is no general right to explore the mental processes of an administrator. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

Capital Citizens appear to rely mainly on an allegation that there has been no change in the situation

^{3/} Capital Citizens also challenge the EIS because it was prepared by an independent contractor hired by the State, and not by the State itself. This claim is meritless. Essex City Preservation Ass'n. v. Campbell, 536 F.2d 956, 959 (C.A. 1, 1976); Natural Resources Defense Council v. Callaway (New London), 524 F.2d 79, 88 (C.A. 2, 1975).

Capital Citizens' only specific complaint is that the federal officials found nothing seriously wrong with the EIS.

since 1973 and for this reason we should ignore Public Law 94-83 permitting delegation, and this Court's subsequent decision in Conservation Society. The extent of participation by the Federal Government is well documented and the district court found it adequate which may not be set aside unless clearly erroneous. We submit that his finding was correct.

Since no serious argument is mounted with respect to a genuine material factual dispute with respect to the EIS and 4(f) statement and findings we shall deal with that subject indirectly as we deal specifically with our discussion of the several documents involved.

Finally we note on this general issue that summary judgment was also appropriate on the issue of navigability of the Susquehanna River. Plaintiffs did not produce any evidence on the subject (A542-A543). As the district court therein notes, Capital Citizens rely on dicta in a lower state court decision. Navigability of a stream is an issue of mixed fact and law affecting jurisdiction and streambed title. The Supreme Court, in such cases, does not necessarily accept unanimous factual findings by the federal district court

and the court of appeals. United States v. Appalachian Power Co., 311 U.S. 377, 403-404 (1940). Similarly, the district court as it correctly pointed out (A542-A543) does not have to decide such a sensitive issue based only on dicta from a state trial court. In fact, as noted by the district court, the issue need not be decided at all in a definitive sense since nothing results from the issue in this case.

II

UNDER ALL OF THE CIRCUMSTANCES THE SEVERAL EIS AND 4(f) PROCEDURES AND FINDINGS WERE ADEQUATE

A. The three EIS contain an adequate discussion of all the elements required by Section 102(2)(C). At the outset we note that we fully agree with appellants that the mere filing of an EIS or even several, as here, does not fulfill the requirements of NEPA (Br. 33). They must be adequate in that they must inform the decision maker of environmental problems the project might create, possible mitigation thereof, alternatives thereto, irretrievable commitments of resources, long term versus short term enhancement or derogation of resources, productivity, and the environment. We have no quarrel with the cases cited that so state (Br. 33-36).

Instead we turn to some of the details and circumstances of the EIS.

As conceded by appellants (Br 36) the 1972 EIS (the Otsigol Schoharie Statement) was drafted early in the development of the NEPA process. It is common knowledge that the early EIS may well not come up to the standards of the more recent ones with respect to the fullest disclosure nor the absolutely best information for the decision maker.^{4/} Even so we invite the Court's attention to the realistic attempt to discuss alternatives at pp. 34-39 of the EIS where at least five alternatives were discussed including the advantages and disadvantages of each were considered including land use changes anticipated. So also was the commitment of resources and the necessary actions to be taken to minimize environmental harm including air pollution (pp. 40-42). In addition a substantial section was devoted to comments and

^{4/} A parallel to this thesis might well be that the so-called segmentation objection would be ill-founded under these circumstances. Since highways and other engineering projects are constructed on a step by step basis it was only natural in the early days that the EIS for such projects were prepared on the same basis. But as can be seen readily in the 1976 EIS that flaw has been corrected as to the EIS even though the engineering problems remain the same.

counter comments on the EIS (pp 43-65). All of this information was then brought to the attention of the decision makers.^{5/} Considering the circumstances that this was an early EIS we believe it is more than adequate to inform the public and the decision maker of the problems involved and that is all that is required. Coalition For Responsible Regional Development v. Coleman, C.A. 4, No. 76-1400, April 11, 1977; Concerned About Trident v. Rumsfeld, C.A. D.C. Nos. 75-1515, 75-2053, October 13, 1976, slip op. pp. 20-21.

In the interests of brevity we turn to the 1976 Albany EIS to demonstrate the development of the process and the additional care taken to have the facts and problems before the public and the decision maker. Without going into great detail we note that at pp. 81-88 the EIS discusses the air and noise pollution problems connected with the construction of any highway and this one in particular and call to the Court's attention only the conclusions at p. 85 as to air:

^{5/} We agree with the district court's view that these comments and counter-comments as they appear in the EIS militate in favor of adequacy rather than against since the object of the EIS is to acquaint both the public and the decision maker with the problems.

Compared to the null alternative, air pollutant burdens will be measurably worse with I-88, but project area air quality will remain well within federal standards. Because gains in air quality from vehicle emission controls are partly offset by emissions from project area travel increases attributable to I-88's presence air quality impacts must be termed adverse, significant, and long-term.

and at p. 88 as to noise pollution;

Noise emitted by vehicles is a long-term adverse consequence that can not be totally avoided. Federal guidelines require that abatement measures be evaluated for all sites exceeding the design noise level. Additionally, on this project, all sites with a predicted noise level 10 dBA over the existing noise level has been evaluated for abatement measures. In those cases where noise levels cannot be satisfactorily reduced, noise pollution will be an adverse impact of this project.

With respect to alternatives the 1976 EIS shows the development of the process, e.g., a thorough discussion of alternative rail transportation appear at pp. 27-34 with an informal conclusion at p. 34 that:

Many persons reason that the over-all decline in demand for rail passenger service is the result of interstate highway construction. In the case of the Albany-Binghamton Route it can readily be seen that demand subsided well before construction of a paralleled express highway.

Current transportation patterns indicate that rail passenger service best serves trip lengths of between 100 and 400 miles. For shorter trips, auto or bus travel appear more suitable, while air transportation has the advantage for longer trip lengths. The entire Albany-Binghamton Corridor is about 130 miles long, with an average trip length well below this total length. Combining these parameters, and recognizing that access by passengers would be limited to a few key locations; and many travelers opt for the convenience of auto travel; indications are that under present and projected conditions, this corridor could not support Rail Passenger service.

Other main transit alternatives were included e.g. at p. 26

Also mentioned at the Corridor Public Hearing was greater development, encouragement, and use of mass transportation modes as an alternative to highway construction. A survey of existing modes in the Binghamton-Capital District corridor indicated two or three daily round trips by bus and two daily round trips by commuter airlines. Railroad passenger service on the Delaware & Hudson was suspended several years ago. Present use of mass-transportation facilities in this corridor is thus about 100 passengers per day. Furthermore, statewide feasibility studies indicate that potential viability for rail rapid-transit exists only in the New York-Albany-Buffalo corridor, possibly with an Albany Montreal extension. Also, regional transit studies have not established a sufficient potential demand or need for bus service in the suburban or rural areas of the Binghamton-Capital District corridor. Although New York State has recently invested considerably in mass-transportation facilities in many urban areas throughout the state, it is not yet prudent to provide such service to relatively sparsely settled areas, because of low travel demand and extremely high cost of service.

In short we believe that even a cursory examination of the various EIS involved in this case will convince the court that in the development process since the early 1970's to the present date the FHWA has completely fulfilled all of the requirements of NEPA and has fully exposed all of the pros and cons-- environmental, economic, and sociological of the project undergoing scrutiny here.

B. The procedures and findings required by Section 4(f) of the Federal Highway Act have been met and are supplemented by the facts. - Capital Citizens challenge the discussions of park lands taken or affected by the road. (The "4(f)" statements, required by 49 U.S.C. 1653(f); see also Overton Park, supra.) There appear to be two takings involved here. One is the taking of a .14-acre tail from the three acre Richmondville Recreational Area, discussed in the white covered Otsego and Schoharie Counties EIS, in Appendix E (pp. 94-111) (see especially, map at p. 108); and second, the taking of a 10-15 acre corner from a 400-500 acre game preserve, the Darby Hill Wildlife Preserve. (The 4(f) Statement is included in Exhibit 64 as Appendix B.)

We must take into account that the 4(f) procedures and findings are made in connection with and parallel to the EIS. Consequently everything we have discussed as to the adequacy of alternatives in the EIS are equally relevant to the 4(f) determination. To summarize the facts set forth at pp. 94-111 as to infeasibility of any other route it is apparent that other routes would disrupt the community, would be impracticable because of hilly terrain, cost far more to achieve less, and not be consistent with local planning goals. As a consequence we believe the determination as to the 40 foot by 300 foot strip which will be crossed is fully justified as set for in the summary at pp. 94-95:

As a result of the Section 4(f) involvement with the Richmondville recreational area, preliminary design alignments were developed to determine the feasibility of each location band that had been considered.

In the immediate area of Richmondville three alternative location bands have been considered. Within these three bands, four preliminary design alignments were developed.

The recreational area is a village-owned parcel of land approximately 3 acres in size with a single access from a village street. The recreational facilities are of such a nature that the area is significant only to local interests. Swimming and picnicking are the two major activities of the recreational area. Since neither the swimming pools, the barbecue pits nor the picnic tables are located in the area needed for the interstate highway, no relocations of such recreational features are required. The lands required for the interstate highway are low-lying, subject to flooding and covered by brush and trees. The acquisition is restricted to a portion of a narrow undevelopable sliver of land 300 feet long and 40 feet wide at its widest point. The local authorities have determined that the land to be acquired is insignificant. Village officials have indicated that the area attracts approximately 8100 local people annually.

Measures that will be taken to minimize harm to the recreational area will include landscaping between the highway and the recreational area to provide a visual separation of the two facilities. Acquisition of replacement lands for non-highway purposes is not possible under State Law. The normal right-of-way settlement with the village will account for compensation on the basis of replacement value of land to be taken.

The determination itself (included the maps) pp. 94-111 demonstrate compliance with the law in all respects.

As might be expected because a greater area of recreation would be affected the treatment of the necessity for taking of 10-15 acres and 17 of the 400-500 acre Darby Hill Wildlife Preserve received more complete and detailed treatment. Even in 1972 the 4(f) determination specifically tied itself into the overall EIS as to feasibility. Thus it states at p. 7:

The null, modal, location, and facility-type alternatives to the proposed project are considered and documented in Chapter V of the Environmental Impact Statement. These alternatives are discussed there from the viewpoint of the entire project. Here the discussion of alternatives will be concerned only with the specific area requiring a 4(f) determination.

The determination goes on to point the factors making any other route or alternative ~~infeasible~~ with respect to the specific 10-15 acres of this reserve. For example one alternative would have required adversely affecting two rather than one reserve (p. 3), another was infeasible because of the barrier affect it would have on a village; still another would have adversely affected a cemetery and a significant historic site (a Friends meeting house) (p. 8). For these and other carefully considered reasons set forth in the 4(f) findings it was determined that (p. 8):

Thus there is no acceptable alternative to the use of the small, annual portion of the Darby Hill Wildlife Preserve.

Finally with respect to minimizing harm in addition to the more general measures set forth in the EIS the 4(f) determination concludes at p. 9:

The highway will be very carefully aligned, both horizontally and vertically between the Darby Hill Wildlife Preserve and Quaker Street. It will be blended into the natural terrain with a minimum of disruption at a point that will not encroach on the wooded portion of the preserve land. This alignment will maintain the screening that this heavily wooded area now provides for the developed part of the preserve. In addition, appropriate landscaping treatment will be provided as part of the project to reinforce this screening effect.

Again as was the case with traversing the narrow strip in the recreational area referred to earlier the 4(f) statements coupled with the various EIS indicate compliance with the applicable law and a determination amply supported by the facts.

In conclusion we find it difficult to understand (and this applies to both NEPA and 4(f) determinations) how appellants can argue that as a matter of law both statements are inadequate when it is clear that all legal procedures have been followed and there is no genuine dispute as to material facts, and the facts on the record fully support the decision to complete I-88.

CONCLUSION

For the foregoing reasons the judgment should
be affirmed.

Respectfully submitted,

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